NO. 35677-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Appellant,

v.

ROBERT FAILEY,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Frank E. Cuthbertson, Judge

BRIEF OF RESPONDENT

RITA J. GRIFFITH
Attorney for Appellant

4616 25th Avenue NE, #453
Seattle, WA 98105
(206) 547-1742

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Is RCW 9.94A.035, which classifies felonies defined by statutes other than Title 9A RCW, the Washington Criminal Code statute, inapplicable to the pre-criminal code definition of robbery because robbery *is* currently defined in Title 9A RCW?

2. Is RCW 9.94A.035 at best an ambiguous statute which must be narrowly construed under the rule of lenity to preclude its application to a pre-criminal code robbery statute?

3. Is a narrow construction of RCW 9.94A.035, as inapplicable to former crimes currently codified in Title 9A, required to avoid the disproportional result of having a conviction for robbery which is most similar to the current robbery in the second degree, a class B felony, count as a class A felony?

4. Is a narrow construction of RCW 9.94A.035 required to avoid the disproportional result of having an out-of-state conviction with the same elements be deemed, at most, similar to robbery in the second degree, while a conviction under the former robbery statue is considered a class A felony?

5. Does a trial court properly find that the state has taken inconsistent positions where it represents in a pleading in 1999 that a prior conviction likely washes out, and then argues at a later sentencing, based on a statute that was enacted in 1996, that the prior conviction is a class A felony which never washes out?

6. Where a 1974 robbery conviction is for a general intent crime because it does not allege "intent to steal," is it not, in any event, sufficiently comparable to second degree robbery to count as a strike offense?

B. STATEMENT OF THE CASE

On September 19, 1974, Robert Failey pled guilty to robbery and was sentenced to "a period of not more than 20 years." CP 59-143. He was released on parole on November 18, 1977, after having served an actual sentence of approximately three years. CP 59-143. The information to which he pled guilty alleged that he did

> take personal property from the person or in the presence of Jack Dean Pruitt, against his will or by means of force or violence or fear of immediate injury to his person, the personal property so taken being in the possession of Jack Dean Pruitt, as agent, bailee or employee of

> the 7-11 Store, 6505 Steilacoom Blvd., the owner thereof.

CP 59-143.

In 1974, robbery was not divided into first and second degree robbery, but was defined similarly to what has since been codified in RCW Title 9A as second degree robbery, a class B felony.[1] Former RCW 9.75.010, RCW 9A.56.190, RCW 9A.56.200, RCW 9A.56.210.

At Mr. Failey's sentencing for his current robbery conviction, on December 1, 2006, the trial court, the Honorable Frank Cuthbertson, ruled that the 1974 robbery conviction washed out because Mr. Failey spent more than ten years in the community without committing a new offense after his parole in

---

[1] Robbery under RCW 9.75.010 was broader than robbery under RCW 9A.56.190. It could be committed by fear of future violence or injury. Robbery as codified in RCW 9A.56.190 requires that the taking be "by the use or threatened use of *immediate* force, violence, or fear of injury." Thus, a person could have been found guilty of robbery under the former statute under circumstances which would not constitute robbery under the current statute. Further, as set out in section 4 below, as Mr. Failey was charged in 1974, robbery under RCW 9.75.010 was a general intent crime and for this reason was not sufficiently comparable to second degree robbery to constitute a strike offense.

1977.[2] CP 44-56; RP(12/1) 24. Had the 1974 conviction not washed out, according to the state, it would have been a strike offense which could have subjected Mr. Failey to a sentence of life without parole as a persistent offender.[3] CP 5.

In ruling that the 1974 conviction washed out, the trial court concluded: (a) that RCW 9.94A.035, a statute which categorizes non-Title 9A crimes as class A, B or C felonies depending on the maximum sentences authorized for the crime, was ambiguous and under the rule of lenity could not be interpreted as converting the 1974 robbery to a class A felony; and (b) that the state was estopped, based on its inconsistent position with regard to an earlier plea, from arguing that the 1974 robbery should be included in Mr. Failey's offender score. CP 259-262.

The state appealed Judge Cuthbertson's ruling that the 1974 conviction washed out. 226-240.

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[2] In the State's Opening Brief of Appellant, at page 2, the chart of Mr. Failey's convictions is in error. The date of sentence for his 1974 robbery charge is listed as **9/19/94** instead of **9/17/74**.

[3] As set out below in section 4, the state's belief that the 1974 conviction is a strike offense is incorrect.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY FOUND THAT RCW 9.94A.035 IS AMBIGUOUS AND THAT, GIVEN THE AMBIGUITY, THE RULE OF LENITY APPLIED.

The trial court properly ruled that "RCW 9.94A.035 is not applicable to the instant case because it is ambiguous, susceptible to more than one interpretation" and therefore governed by the rule of lenity. CP 259-262; RP (12/1) 25. The trial court noted that RCW 9.94A.035, reads, in relevant part, "For a felony defined by a statute of the State that is not in Title 9A RCW," and that the felony of robbery "*is* codified at 9A.56.190 through .210." RP(12/1) 4 (emphasis added).

The state argued that RCW 9.94A.035 applies to Mr. Failey's 1974 robbery conviction because he was prosecuted before the codification of the criminal code in Title 9A two years later. The trial court properly found, however, that robbery is a felony defined under Title 9A RCW rather than a "felony" defined by a statute that is not in Title 9A RCW.

As noted by the Supreme Court in State v. Tvedt, 153 Wn.2d 705, 712 n. 2, 107 P.3d 728 (2005), new property crimes have been added to Title 9A RCW since the recodification of crimes in that title,

but "the legislature, not the code reviser placed robbery in chapter 9A.56 RCW. *See LAWS of 1975, 1st Ex. Sess., ch. 260, at 841, 846.* The legislature's placement of an offense within the criminal code is evidence of legislative intent." The Tvedt court also cited a 100-year old-case, State v. Hall, 54 Wash. 142, 102 P. 888 (1909), and noted that the "robbery statute then in effect was in relevant part essentially the same as the present statute." Tvedt, 153 Wn.2d at 714.

Crimes such as vehicular homicide, RCW 46.61.520, formerly 46.56.040, or violations of the Uniform Controlled Substance Act, RCW 69.50, are not within Title 9A RCW. Robbery, however, has been a crime in Washington for 100 years; it is not a crime defined in some statute other than Title 9A. It is a crime within the criminal code and now set out in RCW 9A.56.210. RCW 9.94A.035 is inapplicable to the crime of robbery.

At the least it is ambiguous whether RCW 9.94A.035 applies to Mr. Failey's robbery conviction. Given that ambiguity, the statute must be narrowly construed to be inapplicable to the felony of robbery, which is defined in Title 9A.

State v. Hacheney, 160 Wn.2d 503, 518-519, 158 P.3d 1152 (2007) (the rule of lenity requires a narrow construction of ambiguous statutes, especially statutes which determine whether to impose the most severe penalties of death and life without parole); (citing In re Personal Restraint of Cruz, 157 Wn.2d 83, 88, 134 P.3d 1166 (2006)).

The trial court's ruling that RCW 9.94A.035 is ambiguous and inapplicable to Mr. Failey's 1974 robbery conviction is also the most equitable resolution of the issue. The state's interpretation would result in an anomalous situation in which essentially the same crime would be a class A rather than a class B felony depending on the date it was committed. It would also be contrary to the legislature's intent that robbery be punished as a class B felony, absent additional factors which elevate it to a class A felony.

Further, the legislature's designation of most of the same elements as a class B felony demonstrates the legislature's intent that robbery under RCW 9.75.010 be considered a class B felony.

In State v. Johnson, 51 Wn. App. 836, 759 P.2d 459 (1988), the court held that a 1964 conviction

for taking a motor vehicle should be classified as a class C felony even though it carried a 10-year maximum sentence in 1964. Because taking a motor vehicle was a class C felony under the then-current classification, the court held that any other interpretation would be inconsistent with the purpose of the SRA to avoid diverse treatment:

> We hold that to be consistent with the purpose of the SRA to avoid diverse treatment, the present classification of crimes should be used to determine the pre-SRA classificiation of the crime for offender score and sentencing purposes. Were we to uphold the State's position (classification should be according to the punishment as it was at the time the crime was committed), a person who had committed the crime of taking a motor vehicle in 1974 would be subject to a 10-year wash-out provision, while an individual who committed the same crime the following year would only be subject to a 4-year wash-out provision. Such a result would denigrate the uniform treatment of defendants which is at the very heart of the SRA.

Johnson, 51 Wn. App. at 839-840.

Counting the 1974 robbery conviction as a class A felony would punish convictions for similar crimes differently depending on the date of conviction. It would also punish some Washington robberies more severely than a similar out-of-state conviction. Absent some indication of legislative intent to

punish pre-criminal code Washington convictions more severely, this result is inconsistent with the proportionality goals of the SRA.

The trial court's ruling that RCW 9.94A.035 is inapplicable to Mr. Failey's 1974 robbery conviction should be affirmed. The court properly ruled that the statute was ambiguous and subject to a narrow construction. Any other interpretion would violate the proportionality goals of the SRA.

2. THE STATE'S TORTUOUS ARGUMENT FAILS TO ESTABLISH THAT THE STATUTE IS NOT AMBIGUOUS.

The state urges this Court to follow a tortuous path to avoid finding RCW 9.94A.035 ambiguous. It argues that at the time the Washington Criminal Code was enacted in 1976, "the legislature enacted a provision [RCW 9A.20.040] specifying how previously unclassified felonies should be classified." AOB at 7.

This is not a defensible reading of RCW 9A.20.040. RCW 9A.20.040 by its plain terms applies only where the degree of a a Title 9A crime is dependent on the degree of another previous crime and that previous crime is defined outside of Title 9A and therefore is not classified as a class A, B

or C felony. It provides a means of determining the degree of a non-Title 9A crime in a prosecution for a Title 9A crime, "where the grade or degree of a crime is determined by reference to the degree of a felony for which the defendant previously had been sought, arrested, charged, convicted or sentenced, if such a felony is defined by a statute of this state which is not in Title 9A RCW."

The reference to "previously" in RCW 9A.20.040 does not refer to former crimes, but simply to former convictions for crimes defined outside Title 9A. As the court held in State v. Kelley, 77 Wn. App. 66, 72, 889 P.2d 940 (1995), "every word, clause, and sentence of a statute should be given effect." (citing Klein v. Pyrodyne Corp., 117 Wn.2d 1, 810 P.2d 917, 817 P.2d 1359 (1991)).

> Here, the words "crime" and "felony" distinguish current crimes from past felonies. "In any prosecution under this title where the grade or degree of a [current] crime is determined by reference to the degree of a [previous] felony . . . if such felony is defined by a statute of this state, which is not in Title 9A RCW," then this statute may be used to classify that previous felony as class A, B or C. In other words, this statute classifies past felonies so that the current crime being prosecuted under RCW Title 9A may be graded,

Kelley, 77 Wn. App. at 72.

Thus, RCW 9A.20.040 applies in very specific and limited circumstances. Even if RCW 9A.20.040 applies to former crimes, the circumstances in which it applies do not include calculation of offender score, since RCW 9A.20.040 was enacted in 1976, well before the Sentencing Reform Act of 1981.

Additionally, an interpretation of RCW 9A.20.040, as specifying how "previously unclassified felonies should be classified," would be inconsistent with the legislature's declaration that Title 9A in no way governs the construction of any crime or punishment which occurred before its effective date.

RCW 9A.04.010 provides:

> (1) This title [9A] shall be known and may be cited as the Washington Criminal Code and shall become effective July 1, 1976.
>
> (2) The provisions of this title shall apply to any offense committed on or after July 1, 1976, which is defined in this title or the general statutes. . . .
>
> (3) The provisions of this title *do not apply to govern the construction of and punishment for any offense committed prior to July 1, 1976, ... Such an offense must be construed and punished according to the provisions of law existing at the time of the commission thereof in the same manner as if this title had not been enacted.*

(emphasis added).

Thus, contrary to the state's argument, the legislature did not provide a general formula, in RCW 9A.20.040, for converting pre-Title 9A crimes to Title 9A crimes, and provided instead that pre-Title 9A crimes should be construed as if Title 9A had not been enacted. RCW 9A.04.010.

It is in light of RCW 9A.04.010, not RCW 9A.20.040, as urged by the state, that RCW 9.94A.035 should be construed.

RCW 9.94A.035, on its face, applies to current crimes defined outside of Title 9A RCW. Nothing in it refers to prior crimes which were repealed and recodified in Title 9A RCW. To interpret RCW 9.94A.035 consistently with RCW 9A.04.010 and harmonize the provisions, RCW 9.94A.035 must be limited to currently-defined crimes defined outside of Title 9A. Statutes should be construed to give effect to all of the language and to harmonize provisions. City of Seattle v. Fontainilla, 128 Wn.2d 492, 498, 908 P.2d 1294 (1996).

As defense counsel noted, driving crimes, drug crimes and weapons crimes are defined outside of Title 9A, in Titles 46 and 69 and at RCW 9.41. RP(12/1) 14-15. RCW 9.94A.035 applies to these

crimes, and not former crimes recodified in Title 9A.

The state's argument that RCW 9.94A.035 should be interpreted in light of RCW 9A.20.040 overlooks the express provision of Title 9A that former statutes must be construed as if Title 9A and its provisions did not exist. RCW 9A.04.010. Nothing in RCW 9A.20.040 makes RCW 9.94A.035 unambiguous or not subject to narrow construction. The trial court's ruling on offender score should be affirmed.

3. THE STATE'S POSITION AT SENTENCING WAS INCONSISTENT WITH ITS PRIOR POSITION ON WHETHER MR. FAILEY'S 1974 CONVICTION WASHED OUT.

In 1993, the sentencing court found that Mr. Failey's 1974 robbery conviction washed out. This is undisputed. See AOB at 12. The state did not appeal this ruling, and it became the law of the case for that 1993 conviction.

Then in 1999, the state filed a "Statement Regarding Amended Information," in which the prosecutor stated that "[t]here is a likelihood that defendant could have been convicted as charged and subject only to a standard range of 57-75 months. It is even possible that the State would be unable to satisfy the Court that a range about 41-54 months

is appropriate." See Appendix A to the Opening Brief of Appellant. This statement of the prosecutor told the sentencing court that, in the opinion of the prosecutor, Mr. Failey's 1974 robbery conviction likely washed out.

Thus, the trial court did not err in finding that the state had taken a position in 1999 inconsistent with its current position that the 1974 robbery did not wash out. The statute on which the state depends, RCW 9.94A.035, was enacted in 1996, prior to the 1999 sentencing.

The state's argument on appeal is that until the decision in State v. Varga, 151 Wn.2d 179, 86 P.3d 139 (2004), it was unclear whether RCW 9.94A.035 could apply so as to revive Mr. Failey's 1974 conviction which had previously washed out.[4] Accordingly, the state argues, its positions were not inconsistent.

This argument must fail. Mr. Failey does not argue that RCW 9.94A.035 should not be applied

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[4] The Supreme Court, in Varga, held that the legislature's 2002 amendments to the SRA unambiguously require the application of current law in calculating offender score, even if an amendment results in counting as offender score a conviction for a crime which had washed out under the SRA as it existed before the amendments.

retroactively to him. His argument is that RCW 9.94A.035 is simply inapplicable to him.

The state represented in its pleadings to the court that an amended information should be filed and a plea agreement for a stipulated 120-month sentence accepted because Mr. Failey's criminal history likely washed out and a significantly shorter sentence would otherwise be imposed. The trial court here properly ruled that given that representation, the prosecutor should be estopped from arguing that his criminal history did not wash out in the current case.

Collateral estoppel applies to criminal cases and is applicable to offender score determinations. State v. Cabrera, 73 Wn. App. 165, 169, 869 P.2d 179 (1994). The doctrine's premise is that parties who have had a full and complete opportunity to litigate an issue should not be allowed to continue to litigate it. Thompson v. Dept. of Licensing, 138 Wn.2d 783, 794-800, 982 P.2d 601 (1999). As long as the prior determination was procedurally fair, collateral estoppal prevents relitigation -- even if the issue was likely wrongly decided. Thompson, at 799-800.

The two essential questions are (1) whether the issue was raised and resolved in a former judgment; and (2) whether the issue raised and resolved in a former judgment is identical to the issue sought to be barred. State v. Peele, 75 Wn.2d 28, 30, 448 P.2d 923 (1968).

Here the issue was raised and resolved by the prosecutor's representations to the court in requesting an agreed-upon 120-month sentence. It is the same issue--whether the 1974 robbery conviction washes out--that is at issue in the current sentencing.

In any event, as set out above, RCW 9.94A.035 is at best ambiguous and must be narrowly construed to preclude application to former crimes which are currently classified in Title 9A RCW. The trial court should be affirmed.

4. MR. FAILEY'S 1974 ROBBERY CONVICTION WAS NOT A STRIKE OFFENSE.

Under In re Personal Restraint of Lavery, 154 Wn.2d 249, 111 P.3d 837 (2005), Mr. Failey's 1974 robbery conviction was not a strike offense. The information charging him did not allege a specific "intent to steal." Absent this allegation, the robbery charge was only a general intent crime and

not comparable to the current robbery in the second degree, a specific intent crime. State v. Kjorsvik, 117 Wn.2d 93, 98, 812 P.2d 86 (1991) ("intent to steal" is an essential element of second degree robbery).

In Lavery, the court held that conviction for federal bank robbery was a general intent crime and not comparable to second degree robbery as defined in Washington because it did not have "intent to steal" as an essential element of the crime. For this reason, it was not legally comparable to second degree robbery. It was not factually comparable because the federal bank robbery statute, as a general intent crime, did not motivate a defendant to pursue defenses available in Washington: "Where the statutory elements of a foreign conviction are broader than those under a similar Washington statute, the foreign conviction cannot truly be said to be comparable." Lavery, 154 Wn.2d at 258. The Lavery court concluded that the federal bank robbery conviction was not comparable to second degree robbery and not a strike offense.

Mr. Failey's 1974 robbery conviction, like the federal bank robbery conviction in Lavery, did not

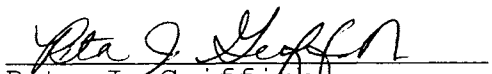
require proof of a specific "intent to steal." Therefore, like the conviction in Lavery, it is not a strike offense. Even if this Court were to hold that the 1974 conviction did not wash out, it cannot, under Lavery, count as a strike offense.

D. CONCLUSION

Respondent Robert Failey respectfully submits that the trial court should be affirmed.

DATED this 28th day of September, 2007.

Respectfully submitted,



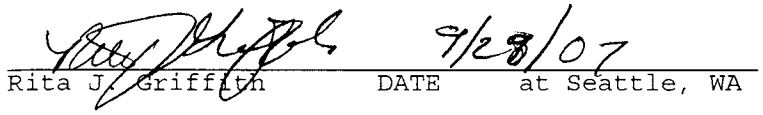
Rita J. Griffith
WSBA No. 14360
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on the 28th day of September 2007, I caused a true and correct copy of the Brief of Respondent to be served on the following via prepaid first class mail:

Counsel for the Respondent:
Michelle Hyer
Office of Prosecuting Attorney
930 Tacoma Ave. S., Rm. 946
Tacoma, WA 98402

Robert Failey
#238737
Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay, WA 98326-9723



Rita J. Griffith DATE 9/28/07 at Seattle, WA